Riverbay Corp., d/b/a CO-OP City and Marion Scott Real Estate, Inc. *and* Johnny Olivo and Narciso Rafael Luna, and District Council No. 9, International Union of Painters & Allied Trades, AFL–CIO, Party-In-Interest and Local 1456, District Council No. 9, International Union of Painters & Allied Trades, AFL–CIO, Party-In-Interest. Cases 2–CA–33290 and 2–CA–33830

August 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMEBERS LIEBMAN AND WASLH

On April 17, 2003, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Parties-in-Interest filed exceptions and a supporting brief and the General Counsel and Respondent filed answering briefs. The General Counsel also filed the brief which she had filed with the judge.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Riverbay Corp., d/b/a Co-op City and Marion Scott Real Estate, Inc., Bronx, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Dated, Washington, D.C. August 29, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT RECOGNIZE Local 1456, DC 9, IUPAT, AFL–CIO, as the exclusive collective-bargaining representative of our employees unless and until Local 1456 is

[1] No exceptions were filed by the Respondent to the judge's finding that it violated Sec. 8(a)(2) and (1) by recognizing Party-in-Interest Local 1456 and executing a collective-bargaining contract with Local 1456 at a time when the Respondent did not employ any employees who were members of Local 1456 or who had authorized Local 1456 as their collective-bargaining representative. Neither the Respondent nor the Parties-in-Interest except to the judge's recommended order requiring the rescission of the collective-bargaining agreements between them.

[2] The Parties-in-Interest have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Parties-in-Interest assert that the recommended Order should be clarified in two respects. They note that the language of the notice to employees does not conform with the language of paragraphs 1(b) and (c) of the Order which, after ordering the Respondent to rescind its collective-bargaining agreements with Local 1456 and District Council No. 9, provide that "nothing in this order shall require the withdrawal or elimination of any wage increase or other benefits or terms or conditions of employment which may have been established pursuant to [those agreements]." By contrast, the corresponding language of the notice informs employees that the Respondent "will not withdraw any wage increase or other benefits or terms or conditions of employment established by [those contracts]."

The Parties-in-Interest assert that the "permissive 'shall not require' language in the Order should be replaced with the mandatory 'will not withdraw' language in the proposed notice of posting." They further urge that we "clarify exactly what is meant by 'wages or other benefits or other terms or conditions of employment established by' the agreements."

We reject both requests. However, in accord with precedent, we reconcile the language of the Order and Notice by issuing a new Notice that conforms with paragraphs 1(b) and 1(c) of the judge's Order. See, e.g., *Windsor Castle Health Care*, 310 NLRB 579, 594 and 596 (1993).

certified by the Board as the representative of our employees.

WE WILL NOT maintain or enforce the collective-bargaining agreement we signed with Local 1456 on June 30, 2000, including its union-security provisions, but nothing in this notice shall require the withdrawal of any wage increase or other benefits or terms or conditions of employment established by that contract.

WE WILL NOT maintain or enforce the collective-bargaining agreement we signed with DC 9 on June 30, 2000, known as the Trade Agreement, but nothing in this notice shall require the withdrawal of any wage increase or other benefits or terms or conditions of employment established by that agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withhold recognition from Local 1456 as your representative unless it has been certified by the Board as your exclusive collective-bargaining representative.

WE WILL reimburse our past and present employees for all dues and other moneys withheld from their pay pursuant to the Local 1456 collective-bargaining agreement, plus interest.

RIVERBAY CORP., D/B/A CO-OP AND MARION SCOTT REAL ESTATE, INC.

Suzanne K. Sullivan, Esq., for the General Counsel.
Andrew Peterson, Esq. (Jackson, Lewis, Schnitzler & Krupman), of White Plains, New York, for the Respondent.
Howard Wien, Esq. (Koehler & Isaacs, LLP), of New York, New York, for the Parties in Interest.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on December 5 and 6, 2002. The Complaint alleges that the Respondent, in violation of Section 8 (a) (1) and (2) of the Act, is rendering unlawful assistance and support to labor organizations.[1] On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent and the Parties-in-Interest in February, 2003, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Riverbay, a domestic corporation and regulated residential housing company under Article II of the New York State Housing Finance Law, with an office and principal place of business at 2049 Bartow Avenue, Bronx, New York, and Marion Scott, a domestic corporation engaged in real estate management with an office and place of business at 107-129 East 126th Street, New York, New York, are joint employers of Riverbay's employees.[3] Riverbay and Marion Scott each annually derives gross revenues in excess of $500,000 and each purchases and receives at its facilities materials valued in excess of $5,000 directly from points located outside the State of New York. Riverbay and Marion Scott are employers engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act. District Council 9, International Union of Painters and Allied Trades, AFL–CIO is a labor organization within the meaning of Section 2 (5) of the Act. Local 1456, District Council 9, International Union of Painters and Allied Trades, AFL–CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The following facts are undisputed on the record.

Riverbay owns and operates a 15,000 unit apartment house complex in the Bronx known as Co-Op City. Riverbay is responsible for running the complex and for providing maintenance and security services. After a lengthy period when Co-Op City was run by a general manager employed by Riverbay, in 1999 the corporation hired a real estate management company known as Marion Scott to manage the property. Kenneth R. Silverman is the Executive General Manager of Riverbay and a Corporate Officer of Marion Scott, Gary Friedland is the Deputy General Manager of Riverbay and an Executive VP of Marion Scott and Peter Jordan is the Director of Restoration of Riverbay.

Riverbay employs about 1000 employees. The instant case is concerned with the Restoration Department. When an owner moves out of an apartment the Restoration Department renovates the apartment by upgrading the floor, changing cabinets, plastering and painting and the like. A total of 160 employees work under Restoration Director Jordan's supervision. Some of these employees are painters, plasterers, porters, plumbers, electricians and members of other trades.

In May 2000 there were about 60 painters and plasterers in a unit covered by a collective bargaining agreement between Riverbay and DC 9 with a term from June 8, 1996 though May 31, 2000. Riverbay has had a thirty-year collective bargaining relationship with DC 9. Each time that DC 9 and the Association for Master Painters and Decorators, an employer associa-

[1] After entering into a non-Board partial settlement agreement with the Charging Parties, Respondent withdrew its Answer to the Complaint. The General Counsel then withdrew Paragraphs 13 and 15 of the Complaint which related to the violations of 8 (a) (3) dealt with by the partial settlement.

[2] The Parties-In-Interest's unopposed motion to correct the transcript is admitted into evidence as ALJ Exhibit # 3 and is hereby granted. In addition, the transcript is corrected so that at page 19, line 9, the correct phrase is "structure is set forth in the"; at page 30, line 14, the last word should be "employer"; at page 85, line 22 and 24 the word "favorite" should be replaced by "favored".

[3] Riverbay and Marion Scott are parties to a contract which provides that Marion Scott is the agent for Riverbay in connection with the operation and management of Riverbay's operations.

tion, bargained a new collective bargaining agreement Riverbay would sign a similar contract with DC 9 known as the Independent Trade Agreement. The Trade Agreement is a typical construction industry collective bargaining agreement. High wages and fringe benefits are provided in recognition of the sporadic nature of construction employment. The union security clause takes effect eight days after hire and benefits are provided through an employer purchase of stamps.

The record shows that the Riverbay painters and plasterers work full-time, fifty two weeks per year, performing maintenance work in apartments and the common areas of Co-Op City. The record contains no evidence that there was any new construction by Riverbay during the period covered by the collective bargaining agreement or for a significant time period before that.

B. The 2000 Negotiations

Michael Munns, a senior attorney in the legal department of Riverbay, testified that there were six to eight collective-bargaining sessions from April to June 2000. The employer committee was composed of Munns, Restoration Director Jordan, Manager Friedland, and Herb Friedman who was not identified on the record. The DC 9 committee consisted of secretary/treasurer and business manager Sandy Vagelatos, president Bill O'Brien, business representative Ben Rodriguez and attorney Howard Wien. Toward the end of negotiations, Local 1456 president John Barnett also attended the negotiations.

Munns testified that Riverbay came into the 2000 negotiations seeking concessions from DC 9. The employer representatives said that the then expiring Trade Agreement was appropriate only for new construction. The employer pointed out that the Trade Agreement was a typical construction industry collective bargaining contract with higher wages appropriate to seasonal work. Riverbay maintained that it could not continue paying these higher wages and it demanded a 50% cut in labor costs. The DC 9 representatives replied that the employer's demands were too harsh. During the succeeding weeks the parties discussed a two-tier wage structure as a means of cutting labor costs, but DC 9 would not agree to a two-tier wage package because its contracts with other employers contained a most favored nations clause. DC 9 suggested that Riverbay could hire lower paid apprentices, but this idea was rejected because the Riverbay employees had to be able to work alone with minimal supervision.

Eventually, according to Munns, the DC 9 representatives brought in a contract used at Parkchester, another large cooperative residential complex in the Bronx. This contract was applicable to a unit of maintenance painters and plasterers represented by Local 1456. The Local 1456 unit members received wages 40% lower than the wages Riverbay was paying to its painters and plasterers. Munns was given to understand that in Parkchester there were two units of painters and plasterers; one unit was represented by DC 9 and the other was represented by Local 1456. The DC 9 painters did work requiring large areas of new plaster and paint and the Local 1456 painters did work such as repainting a single wall. Riverbay agreed that it would pay one-half of its painters and plasterers according to the DC 9 Trade Agreement and one-half of its painters and plasterers according to the Local 1456 agreement. According to Munns, this method of reducing wage costs had been suggested by DC 9. Munns had never heard of Local 1456 before the Union representatives brought in the Local 1456 collective bargaining agreement for the employer to look at. According to Munns, Local 1456 president John Barnett was present at the negotiations because he was the only one with the requisite experience to explain the Local 1456 contract. None of the other union negotiators knew about that contract.

Sandy Vagelatos, the business manager, secretary/treasurer and chief executive officer of DC 9, testified about the negotiations with Riverbay in the spring and summer of 2000.[4] Vagelatos recalled that Riverbay asked for 50% cutbacks in wages and benefits and proposed a two tier wage structure. Vagelatos stated that he could not recall specific proposals nor could he recall whether DC 9 conducted a strike when the contract expired or after the contract was extended. Vagelatos stated that Riverbay demanded the same arrangement as the one existing at Parkchester, which he described as two units of DC 9 with "full workers and the maintenance workers." Vagelatos said the Union negotiated the 50/50 clause "to protect those members that were working there . . . for many years."

On June 30, 2000 Riverbay entered into two collective bargaining agreements with terms from June 1, 2000 to April 30, 2005. Riverbay executed a "Trade Agreement between District Council No. 9, International Union of Painters and Allied Trades, AFL-CIO and Riverbay Corporation". This contract was signed by Friedland for the "Independent Employer" and Vagelatos "for District Council No. 9." Riverbay also executed a "Collective Bargaining Agreement between Riverbay Corporation and Local 1456, District Council 9, International Union of Painters & Allied Trades, AFL–CIO". This contract was signed by Friedland for the employer and John Barnett for "Local Union."

The Trade Agreement between Riverbay and DC 9 contains the following language:

> Art III. Sec 1(b)—The parties have agreed to establish a maintenance wage and fringe benefit schedule. This maintenance schedule shall be contained in a separate maintenance collective bargaining agreement. The average number of employees covered by the maintenance collective bargaining agreement shall not exceed the average number of Journeypersons and apprentices covered by this Trade Agreement.
> ….

The collective bargaining agreement between Riverbay and Local 1456 provides on the last page:[5]

> The average number of employees covered by this collective bargaining agreement shall not exceed the average number of Journeypersons and apprentices covered by the Trade Agreement between the Union and the Employer.
> …

[4] Vagelatos' duties include supervising business representatives and organizers and supervising the execution of agreements.

[5] The Local 1456 agreement has a thirty day union security clause. Employer contributions are required to various fringe benefit funds and provision is made for holidays, personal days, sick leave and the like.

On the same day that the two contracts were signed, a side letter was entered into by Friedland and Vagelatos which provided:

> Whereas the parties have executed both a Trade Agreement and a maintenance collective bargaining agreement the parties agree that all employees whether covered by the maintenance or Trade Agreement may be assigned to any task, without limitation or restriction, specified in Section 6 of the IUPAT General Constitution.
>
> This is to acknowledge and agree that the work historically performed by DC-9 members for Riverbay Corporation including plastering, skim coating, and all application to walls and ceilings of plaster or similar material including, without limitation, all use of such materials on work preparatory to painting, must continue to be solely within the scope of work performed by DC-9 members covered by either agreement for Riverbay Corporation.

Munns testified that the purpose of the side letter was to insure that all the plasterers and painters employed by Riverbay would continue to do the same work without regard to which collective bargaining agreement they were working under. Munns had been told that at Parkchester the Local 1456 employees did not do complete painting jobs; only DC 9 employees could paint an entire apartment. Riverbay did not want to adopt the Parkchester division of labor and it would not have signed the two collective bargaining contracts without the side letter.

Munns testified that when the contracts were signed he was present on behalf of Riverbay with managers Silverman and Friedland, and with the then outside counsel, Attorney Mark Brosman. The Union was represented by Attorney Wien, Vagelatos, Bill O'Brien and Local 1456 president John Barnett.

There is no dispute that when the contracts were signed on June 30, 2000 none of Riverbay's employees were members of Local 1456 and Riverbay had not been presented with a showing of majority support for Local 1456. Indeed, all of Riverbay's painting employees were members of DC 9.

The record shows that the ratification vote for the 2000 contract was a ballot to ratify the Independent Trade Agreement only.[6] There was no ratification vote for the Local 1456 collective bargaining agreement. Vagelatos testified that Local 1456 members were not consulted when the Local 1456 maintenance agreement was signed with Riverbay.

C. Administration of the Contracts

After the contracts were signed, Riverbay called Local 1456 representative James Barnett and asked him to refer applicants for employment.[7] As the Local 1456 members were hired and trained, Riverbay laid off the higher paid DC 9 employees until a balance of 50/50 was reached between the Local 1456 employees and the DC 9 employees. The record shows that all of the Restoration Department employees are supervised by Jordan and that they work side by side doing the same work at the same work sites on a regular basis.

Munns testified that from the time the contracts were signed grievances pertaining to the Local 1456 unit have been handled by either John or James Barnett. There have been no grievances filed in that time period relating to employees covered by the DC 9 contract. Before June 2000, DC 9 business representative Ben Rodriguez handled any grievances for the painters unit.

Efrain Soto testified that he worked as a plaster man at Riverbay from February 1992 until he was laid off in January 2001. Soto was a member of DC 9 and of Local 19, its Bronx local. Soto stated that after June 2000 his business agent was Ben Rodriguez and his shop steward was Michael Francis. Soto did not know the name of the Local 1456 shop steward nor of its business agent. No one ever told Soto that James Barnett was his business representative.

James (Jim) Barnett testified that he was the financial secretary of Local 1456 until sometime in June 2000. Since July 3, 2000 he has been employed by DC 9 as a business representative.[8] He had not held any position with DC 9 prior to that date. James Barnett testified that as a business representative he polices the collective bargaining agreement for DC 9. Barnett stated that members of various locals in the New York City area have worked at Riverbay under the Local 1456 collective bargaining agreement since January 31, 2001. Barnett stated that his duties on behalf of Riverbay employees involve visiting the property and the men, filing grievances and taking care of problems. Although Barnett maintained that he is the business representative for both the Local 1456 collective bargaining agreement and the Trade Agreement, he has only discussed Local 1456 grievances with Riverbay.

D. Union Structure and Relationships

Vagelatos testified that Local 1456 was a "fully affiliated" local union within DC 9. He stated that DC 9 negotiates on behalf of fully affiliated locals, polices the collective bargaining agreement and handles the payroll of service representatives as well as organizing activities. A fully affiliated local has local union officers such as a president, recording secretary, financial secretary board of trustees and treasurer. Vagelatos stated that these officers do not negotiate contracts, they do not process grievances and they do not organize.

Vagelatos stated that when Local 1456 became a fully affiliated local of DC 9 in February of 1995 it no longer had its own business manager or business representative. Vagelatos said that until the time of the full affiliation John Barnett had been the business manager of Local 1456 and had functioned as the executive officer of the local. After the affiliation, John Barnett was elected a business representative of DC 9 and he came under Vagelatos' supervision. Vagelatos assigned him to negotiate the maintenance agreements for DC 9 and to service the members of the maintenance union, Local 1456.

The affiliation agreement signed by Local 1456 and District Council 9 in February 1995 identifies John Barnett as "business manager and president." James Barnett is identified as the financial secretary and treasurer. The affiliation agreement states that DC 9 will assume the policing and administration of

[6] The ballot reads: "DC 9 Official Ballot for Riverbay DC 9 Trade Agreement" and is followed by boxes for voting "yes" or "no".

[7] James Barnett is the son of John Barnett.

[8] James Barnett is a member of Local 1456.

the Local Union 1456 working agreements and generally serve as the collective bargaining representative of the employees. In addition, DC 9 agrees to employ John Barnett and to maintain the current office of Local 1456 "for the representative to work out of."

According to Vagelatos, in June or July 2000 John Barnett retired and he was replaced by his son, James Barnett. Vagelatos stated that he assigned James Barnett to service all the members at Riverbay. Vagelatos also testified that for at least six months before and six months after the negotiations Rodriguez was assigned to service the members at Riverbay. Vagelatos said that there were separate shop stewards for Local 19 and Local 1456. He could not recall the name of the Local 1456 shop steward at Riverbay from June to December 2000. He recalled that Ray Gilliard was the shop steward for Local 19.

Vagelatos' testimony that John Barnett retired in June or July 2000 is contradicted by the LM-3 form filed by Local 1456 for the period January 1 through December 31, 2001. On that form John Barnett has affixed his signature as the president of Local 1456 and James Barnett is still the treasurer.

The parties stipulated that a majority of the maintenance agreements negotiated during 1999, 2000 and 2001 describes the union party as Local 1456 without reference to DC 9. Several contracts state both DC 9 and Local 1456. All of the contracts were signed on behalf of the union by John Barnett or James Barnett.

Vagelatos testified that Local 19 and Local 1456 have different business addresses, different presidents, officers and trustees, different shop stewards and separate regular elections for officers. Local 1456 members attend separate meetings. It is not possible to be a member of both Local 19 and Local 1456. The DC 9 journeyman hiring list is separate from the Local 1456 hiring list. However, Vagelatos pointed out, members of Local 1456 and Members of Local 19 are also members of DC 9.

III. DISCUSSIONS AND CONCLUSIONS

I shall credit the testimony of Munns concerning the negotiations for the contracts signed on June 30, 2000. His recollection was clear, he answered forthrightly and his testimony was in accord with the documentary evidence. I find that Vagelatos' testimony is not reliable because he could not remember certain important facts and his testimony on some important matters varied from the documentary evidence. Thus, I shall not rely on Vagelatos' testimony where it is not supported by documentary or other evidence.

I find that in response to Riverbay's demand for wage reductions in the 2000 negotiations the DC 9 representatives proposed the adoption of a so-called maintenance contract similar to the one in use in Parkchester. DC 9 proposed to Riverbay that some of its painters and plasterers would be paid lower wages according to the Local 1456 maintenance contract. DC 9 proposed that Riverbay would enter into two contracts: the Independent Trade Agreement with DC 9 and the maintenance collective bargaining agreement with Local 1456. The aim of this arrangement was to permit Riverbay to pay some of its unit members lower wages without triggering the me-too clauses in the DC 9 contracts with other employers. At this time, Riverbay had received no showing of majority support for Local 1456.

The two contracts signed by Riverbay on June 30, 2000 provided that there would be a 50/50 ratio of employees covered by the DC 9 contract and the Local 1456 agreement. The side letter entered into on the same day provided that the employees operating under both contracts would do the same work. Indeed, unit employees covered by the two contracts now work side by side, under the same supervision, at the same locations and performing the same work. After June 30, 2000 Riverbay hired painters and plasterers referred by Local 1456 and laid off unit employees covered by the DC 9 contract until the 50/50 ratio of employees under both contracts was achieved.

The Bronx painter's local with jurisdiction over the original Riverbay employees covered by the Independent Trade Agreement is Local 19. This local has its own business address and it conducts elections for officers. Vagelatos conducts negotiations for the Trade Agreement and it seems that the Local 19 officers are not involved in this process. There has always been a shop steward at Riverbay for the DC 9 unit. The record shows that before June 2000 grievances brought under the DC 9 contract were handled by business agent Ben Rodriguez, an employee of DC 9. There have been no grievances filed since that time.

Local 1456 has its own business address and it conducts elections for officers. Although Vagelatos testified that a fully affiliated local union such as Local 1456 does not negotiate its own contract and does not process its own grievances, the record in the instant case contradicts that assertion. The documents show that John Barnett was the president of Local 1456 during the 2000 negotiations with Riverbay and that he signed the contract not as a representative of DC 9 but as the president of the "Local Union." Further, Munns' testimony establishes that Barnett was the one who explained the Local 1456 contract during the negotiations. Munns testified that no one else present knew about the contract: thus, it is clear that Barnett, and not Vagelatos, negotiated the Local 1456 contract. The record shows that a majority of the agreements negotiated by Local 1456 in 1999, 2000 and 2001 do not refer to DC 9 as a party and all of these agreements were signed by either John Barnett or his son James Barnett. After June 2000 grievances brought by Riverbay employees under the Local 1456 contract were handled by either John or James Barnett. The LM-3 form filed by Local 1456 shows that John Barnett was the president of Local 1456 until at least December 31, 2001. Thus, I find that John Barnett, the president of Local 1456 during and after the negotiations in 2000, negotiated and signed the contract with Riverbay and that he handled grievances brought by Riverbay employees pursuant to the Local 1456 contract. Although the 1995 affiliation agreement with DC 9 provides that DC 9 will employ John Barnett, the affiliation agreement shows that John Barnett worked out of the Local 1456 office when he fulfilled his functions during the negotiations and under the grievance provisions of the contract.

No vote was ever held to ratify the Local 1456 contract with Riverbay. The DC 9 Trade Agreement was ratified by the employees working at that time. Of course, these were all em-

ployees governed by the DC 9 Trade Agreement. The employees of Riverbay, who were working under the DC 9 Trade Agreement, were never asked to ratify the Local 1456 contract which was signed the same day as the DC 9 contract. Thus, it is clear that DC 9 and Local 1456 have separate ratification procedures.

The Parties-In-Interest urge that DC 9 and Local 1456 constitute a single union because of the control exercised by DC 9 over Local 1456. Arguing that the Riverbay employees working under both the Local 1456 and DC 9 contracts are a single bargaining unit, the Parties-In-Interest maintain that the new employees subject to the Local 1456 contract are in effect an accretion to the existing unit functioning under the DC 9 Trade Agreement. The Parties-In-Interest state in their brief:

> Here, there is no "new" or "rival" union. Rather, District Council No. 9 and . . . Local Union No. 1456 are a unitary entity for the purposes of collective bargaining and contract enforcement. … Although … a variety of agreements are negotiated throughout district Council No. 9's geographic jurisdiction with various employers, it is always the same union—District Council No. 9—negotiating those agreements. Thus the union executing the trade agreement and the maintenance agreement was a single union representing the same class of Riverbay employees, painters, that it has for the past several decades.

Even if DC 9 and Local 1456 are not found to be the same union, the Parties-In-Interest argue that they jointly represent an accreted unit.

Although the Parties-In-Interest argue that Local 1456 has no independent functions and that its collective bargaining functions are in reality exercised by DC 9, this contention is without merit. Indeed, all the evidence shows that Local 1456 has maintained its existence as a union with its own business offices, elections, meetings, officers, shop stewards, business representatives for grievances and separate collective bargaining agreements. Local president John Barnett has negotiated and signed collective bargaining agreements on behalf of Local 1456 while working out of the Local 1456 offices. Whatever may have been contemplated by the affiliation agreement between DC 9 and Local 1456 cannot change the actual administration of Local 1456 as shown by the evidence herein. All the evidence shows that Local 1456 is not the same union as either DC 9 or Local 19. The mere fact of affiliation with DC 9 does not constitute a merger with either DC 9 or Local 19. There is no claim on the record that Local 1456 merged with any other union. It is undisputed that members of Local 1456 cannot also be members of Local 19.

The Parties-In-Interest's contention that the separate unit of maintenance employees established after the Local 1456 agreement was signed constitutes an accretion is entirely without merit and requires no extended discussion to discredit. There is no way to fit the facts in this case into the fact pattern of an accretion. The employees purportedly accreted in the instant case did not join an existing unit of employees with whom they had a community of interest. Instead, the new employees were hired under a totally different collective bargaining agreement which provided different terms and conditions of employment and was administered by different union representatives. It is well established that the Board defines an accretion as "the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees and have no separate identity. The additional employees are then properly governed by the unit's choice of bargaining representatives." *Safeway Stores*, 256 NLRB 918, 924 (1981). Here the new "maintenance" employees were given a decidedly separate identity with different bargaining representatives and a different collective-bargaining contract. It is significant that in all the accretion cases cited by the Parties-In-Interest, it was understood that employees accreted into a pre-existing represented unit would be covered by the pre-existing collective bargaining agreement.

When Respondent signed the Local 1456 collective bargaining agreement it did not employ any employees who were members of Local 1456 or who had authorized Local 1456 as their bargaining representative. By recognizing Local 1456 and signing a contract for these as yet non-existent employees the Respondent violated Section 8 (a) (1) and (2) of the Act.

Thus the Local 1456 collective bargaining contract must be rescinded. *Windsor Castle Health Care Facilities*, 310 NLRB 579 (1993).

The General Counsel argues that the DC 9 Trade Agreement signed by Riverbay on June 30, 2000 is unlawful and should be rescinded because it was entered into in furtherance of the minority recognition of Local 1456. The General Counsel points out that the DC 9 Trade Agreement was entirely contingent on the Local 1456 contract. General Counsel states, "DC 9 should not be able to achieve through an unfair labor practice violation that which it could not achieve at the bargaining table; namely, preservation of the trade agreement without a reduction in the wage rates." I find that the DC 9 agreement would never have been signed if the parties had not entered into the unlawful Local 1456 contract on the same day. The DC 9 agreement contemplates that 50% of the future work force would be covered by the Local 1456 contract and the high DC 9 wages are the result of the markedly lower wages to be paid under the Local 1456 contract. Indeed, when DC 9 entered into the Trade Agreement the parties clearly contemplated that currently employed DC 9 unit members would be laid off to make room for lower paid Local 1456 unit members. And, in fact, this sacrifice took place. Because the DC 9 Trade Agreement of June 30, 2000 was signed as part of an unlawful arrangement which was designed to deprive employees of their rights in violation of Section 8 (a) (2) of the Act it should be rescinded.[9]

I note that the Consolidated Complaint herein alleges that not only is the union security clause in the Local 1456 contract unlawful, but it also alleges that the union security clause in the DC 9 Trade Agreement is unlawful. Although the General Counsel did not litigate this allegation at the hearing I assume it

[9] I note that there is no evidence in the record to support the statement in Counsel for the General Counsel's brief that "the Union presented a *fait accompli*: if the members did not ratify the DC 9 contract which provided for the introduction of Local 1456, they would be laid off and all of the work would be subcontracted."

is based on the apparently conceded fact that the Respondent is not an employer primarily engaged in the construction industry as contemplated by Section 8 (f) of the Act. However, in the absence of specific argument on the record or in the brief relating to this issue, I shall not find a violation or order any remedy relating to the union security clause in the DC 9 Trade Agreement.

The Complaint alleges that the unit described in the June 2000 DC 9 Trade Agreement is not an appropriate unit for the purpose of collective bargaining and that since June 1, 2000 DC 9 has not represented a majority of employees in a unit appropriate for collective bargaining. The record shows that the General Counsel did not litigate this issue in these terms and there is no discussion in the brief of this Complaint allegation. Indeed, the brief filed by Counsel for the General Counsel states that the only issue for decision is whether extension of recognition and entering into the Local 1456 collective bargaining agreement is a violation of Section 8 a (1) and (2) of the Act. However, the brief also urges that the proper remedy in this case is for the *status quo ante* to be restored and that Respondent should be ordered to recognize DC 9 as the bargaining representative of employees in a unit consisting of "All painters and allied trades as defined by the International Union of Painters and Allied Trades General Constitution Section 6, issued January 1, 2000." Thus, the General Counsel's position is that both contracts should be rescinded and that DC 9 should be recognized as the majority representative. The record before me is clear that all the Respondent's painters and plasterers work in a single appropriate unit. None of the parties to the instant proceeding has argued to the contrary. However, the Complaint does not allege a violation of Section 8 (a) (5) and I decline to issue a bargaining order in this case.

CONCLUSIONS OF LAW

1. By recognizing Local 1456 and signing a collective bargaining agreement with Local 1456 when Respondent did not employ any employees who had authorized Local 1456 as their bargaining representative the Respondent violated Section 8 (a) (2) and (1) of the Act.

2. The General Counsel has not shown that Respondent engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found above that the Respondent unlawfully recognized Local 1456 and entered into a collective bargaining contract with it on June 30, 2000. Respondent should be ordered to withdraw recognition from Local 1456 unless and until Local 1456 is certified as the representative of its employees. Respondent should also be ordered to cease giving effect to the collective bargaining agreement it entered into with Local 1456. Respondent should be ordered to reimburse all employees for fees and dues withheld from their pay pursuant to the collective-bargaining agreement executed between Local 1456 and Respondent, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I have also found above that the Independent Trade Agreement signed with DC 9 should be rescinded.

Nothing in the remedial order shall require the Respondent to withdraw or eliminate any wages or benefits or other conditions of employment which were established pursuant to either of the collective bargaining agreements it entered into on June 30, 2000.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Riverbay Corp., d/b/a Co-Op City and Marion Scott Real Estate, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing Local 1456, District Council No. 9, International Union of Painters & Allied Trades, AFL-CIO, as the exclusive collective bargaining representative of its employees unless and until Local 1456 is certified by the Board as the collective-bargaining representative of Respondent's employees.

(b) Maintaining or giving any force or effect to the collective-bargaining agreement between Respondent and Local 1456 dated June 30, 2000, including a union security provision, provided that nothing in this order shall require the withdrawal or elimination of any wage increase or other benefits or terms or conditions of employment which may have been established pursuant to the Local 1456 contract.

(c) Maintaining or giving any force or effect to the collective-bargaining agreement between Respondent and District Council No. 9, International Union of Painters & Allied Trades, AFL-CIO, known as the Independent Trade Agreement, dated June 30, 2000, provided that nothing in this order shall require the withdrawal or elimination of any wage increase or other benefits or terms or conditions of employment which may have been established pursuant to the Trade Agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withhold recognition from Local 1456, District Council No. 9, International Union of Painters & Allied Trades, AFL-CIO, as the representative of its employees unless the Union has been certified by the Board as their exclusive collective-bargaining representative.

(b) Reimburse its past and present employees for all dues and other moneys withheld from their pay pursuant to the Local 1456 collective-bargaining agreement, plus interest, in the manner set forth in the remedy section.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 2000.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 17, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT recognize Local 1456, DC 9, IUPAT, AFL–CIO, as the exclusive collective-bargaining representative of our employees unless and until Local 1456 is certified by the Board as the representative of our employees.

WE WILL NOT maintain or enforce the collective-bargaining agreement we signed with Local 1456 on June 30, 2000, including its union-security provisions, but we will not withdraw any wage increase or other benefits or terms or conditions of employment established by that contract.

WE WILL NOT maintain or enforce the collective-bargaining agreement we signed with DC 9 on June 30, 2000, known as the Trade Agreement, but we will not withdraw any wage increase or other benefits or terms or conditions of employment established by that agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withhold recognition from Local 1456 as your representative unless it has been certified by the Board as your exclusive collective-bargaining representative.

WE WILL reimburse our past and present employees for all dues and other moneys withheld from their pay pursuant to the Local 1456 collective-bargaining agreement, plus interest.

RIVERBAY CORP., D/B/A CO-OP CITY AND MARION SCOTT REAL ESTATE, INC.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."